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IN THE

Supreme Court of the United States

October Term, 1963.

No. 221

LOUIS MARGOLIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF LOUIS MARGOLIS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH P. ALTIER,
Counsel for Petitioner,
450 Seventh Avenue,
New York 1, N. Y.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	6
Reasons for Granting the Writ	9
Conclusion	18
APPENDIX	
Judgment	A1
Order Extending Time to File Petition for Writ of Certiorari	A3
Opinion	A4

CASES CITED

Caldwell v. United States, 205 F. 2d 879 (D. C. Cir. 1953)	12
Coplon v. United States, 191 F. 2d 749 (D. C. Cir. 1951) Cert. Denied, 342 U. S. 926	12, 13
Glasser v. United States, 315 U. S. 60 (1942)	13

PAGE

Jencks v. United States, 353 U. S. 657 16

Palermo v. United States, 360 U. S. 343 16

Scales v. United States, 367 U. S. 203 16

Spano v. New York, 360 U. S. 315 13

United States v. Annunziato, 2 Cir. 293 F. 2d 373 Cert. denied 368 U. S. 919 15

United States v. Demmo, 221 F. 2d 626 (2d Cir. 1955) Cert. denied, 349 U. S. 968 ..... 12, 13

United States v. Simmons, 2 Cir. 281 F. 2d 354 15

United States v. Venuto, 182 F. 2d 519 (3rd Cir. 1950) 12, 13

Willis v. Hunter, 166 F. 2d 721 (10th Cir. 1948) Cert. Denied, 334 U. S. 848 13

STATUTES CITED

28 U. S. C. 1254(1) 2

18 U. S. C. 371 3

18 U. S. C. 1503 12

18 U. S. C. 2315 3

18 U. S. C. 3500 ..... 3, 7, 14

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Defendant-Appellant, Louis Margolis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 24, 1963.

Citations to Opinions Below

The final judgment (179a)* of the United States District Court for the Southern District of New York

* References with the prefix "R" are to the record on appeal; those with the prefix "A" are to the appendix of this petition, *infra*; those with the suffix "a" are to the separate appendix of appellants Margolis, Harris and Kaminsky accompanying this petition.

(Murphy, D. J.) was entered without opinion on November 3, 1961. The opinion of the Court of Appeals for the Second Circuit (R. 3397-3415) Docket No. 27299, April 24, 1963 affirming petitioner's conviction is not officially reported. It appears in full in the appendix, *infra*, pages A4 to A21.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 24, 1963 and is printed in the appendix, *infra*, pages A1 to A2. An order extending time to file this petition was granted on May 15, 1963, *infra*, page A3. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

(a) Whether under the Sixth Amendment of the United States Constitution petitioner was deprived of his right to unhampered legal representation at all stages of the criminal prosecution by an FBI agent who subjected petitioner to post-arraignment and post-indictment interrogations and unsolicited legal advice inconsistent with his defense.

(b) Whether in view of the language of the concurring circuit judge, this court will act to resolve the Jencks Act question implicitly directed by the court below.

(c) Whether petitioner was deprived of a fair trial by the curtailment of cross-examination of two government witnesses who were permitted to invoke the privilege against self-incrimination, and to thereby close off cross-examination on decisive points in their testimony.

Statutes Involved

Title 18, United States Code

Sec. 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Sec. 2315. Sale or receipt of stolen goods, securities, or monies.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

§3500 Crimes and Criminal Procedure

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of

determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

Statement

This is a petition from the affirmance by the Circuit Court (A1-A2) of a final judgment (179a) of the United States District Court for the Southern District of New York, (Murphy, D. J.), entered November 3, 1961, after a non-jury trial, convicting petitioner Louis Margolis under one conspiracy count (Count Four—18 U. S. C. 371), and one substantive count (Count Three—18 U. S. C. 2 and 2315), charging violation of the statute against sale or receipt, etc. of stolen goods (furs) (9a).* Petitioner was convicted as an alleged receiver in New York City of furs allegedly stolen in Paterson, New Jersey. He was sentenced concurrently to four years imprisonment on each count (180a). He is free on $3,500. bail pending appeal (180a).

Of twelve defendants named under the sale and receiving counts, nine were tried together—defendants Isidor Borgen and Albert Gershberg having been severed and defendant Ohrynowicz having pleaded guilty prior to trial (37a). Defendant Bernard Kaminsky was acquitted (178a) as was defendant John F. Donahue. Convicted along with appellant Louis Margolis under these counts were Ralph Kaminsky, Lawrence Harris, John Cardillo, Nicholas Sten and the two alleged thieves John Knapp and Louis Piselli.

On appeal to the Circuit Court all convictions were affirmed except those of Ralph Kaminsky and Lawrence Harris. These convictions were reversed because of prejudicial limitation of the right to cross-examine a

* The indictment contained two other counts (9a) which did not name Louis Margolis and related exclusively to the alleged interstate transportation of the furs stolen in New Jersey by three men, John Knapp, Thaddeus M. Ohrynowicz and Louis Piselli. These three men, the alleged thieves and transporters, were also named as defendants in counts three and four, the sale and receiving counts.

prosecution witness, Max Friedman. The Circuit Court held that Friedman's invocation of the privilege against self-incrimination thwarted the fundamental right of defendants Kaminsky and Harris to cross-examine their accuser (A10-A13).

When raised on appeal, even though the government conceded that the testimony of Freidman was essential to petitioner's conviction for conspiracy (157a-158a), the Circuit Court held, "Since Margolis' sentence on the conspiracy count is concurrent with the sentence on the receiving count, the judgment below can be sustained, even if the conspiracy conviction was improper" (A19).

The court below rejected petitioner's constitutional point holding that the actions of an FBI agent in speaking to petitioner on two occasions after indictment and one occasion between arrest and indictment in the absence of his counsel did not interfere with his rights to unhampered legal representation (A19-A20).

Petitioner sought review of the decisions of the Trial Court and prosecutor regarding discoverability of statements under 18 U. S. C. Sec. 3500—the Jencks Act. The Circuit Court held "that none of the appellants were entitled to receive these statements" (A18). In a separate opinion, "reluctantly" concurring, Clark, Circuit Judge, noted that correction of Jencks Act non-compliances should come from the Supreme Court of the United States (A21).

The truth of the following facts are not contested for purposes of this petition, and if certiorari is granted, the appeal.

On September 18, 1960 co-defendants Ohrynowicz, Piselli and Knapp burglarized a fur store in Paterson, New Jersey (R. 448-503) and removed approximately 30 furs

to the Port of Authority bus terminal in New York City (40a-41a).*

On September 19 Ohrynowicz and defendant Cardillo, took the furs from the Port Authority locker to Ohrynowicz's hotel room at the Cornish Arms Hotel in New York City (42a). Later that day, the furs were removed to the George Washington Hotel on the east side of Manhattan (42a-43a). In an attempt to sell the garments they were displayed to defendants, John Cardillo, John Donahue, Nicholas Sten and a furrier named Paul Kramer (43a-44a).

On September 20, 1960, the furs were sold to Kramer (44a-45a). Kramer, who was to take possession of the furs on September 21, refused to go through with the purchase (47a, 53a-54a).

On September 19 or 20 the furs were shown to petitioner (45a-46a), and on September 23 the goods were delivered to him on consignment (50a, 106a). A few hours later petitioner sold and delivered the furs to defendant Lawrence Harris (103a). On September 28, 1960 Harris paid petitioner for the furs and that same day petitioner delivered all of the money to defendant Sten and another (104a). Petitioner received no money for his part in the transaction (104a). On September 29, 1960, defendant Harris sold and delivered some of the furs to defendant Ralph Kaminsky (59a-62a).

Petitioner was arrested on October 22, 1960 (99a-100a). According to the testimony of Special Agent Hamilton of the Federal Bureau of Investigation, petitioner admitted at that time that he had received the furs and assumed that they were stolen (101a). According to agent Ham-

* The chronology of the following transactions will vary slightly and irrelevantly among the government witnesses. These variances are not in issue in this petition.

ilton, petitioner stated that he did not learn of the out of state origin of the goods until October 6, when the arrests began (105a).

On November 18, 1960, almost one month after his arrest and arraignment, petitioner was again interviewed by Agent Hamilton (108a). On November 22, 1960 the indictment was entered (1a). In February 1961 and again on April 21, 1961, Agent Hamilton, with full knowledge that petitioner had retained an attorney, improperly interrogated and counselled petitioner (108a-123a).

Reasons for Granting the Writ

1. Certiorari should be granted so that this Court on appeal can define the right of arraigned, indicted and legally represented defendants to be free from unconstitutional questioning, solicitation of testimony and legal counseling by the FBI or other government agency at various stages of the criminal prosecution. This case concerns a basic approach to law enforcement—the permissible involvement of law enforcement agencies with indicted, represented defendants.

Arthur S. Hamilton, an agent of the Federal Bureau of Investigation, first questioned petitioner on the day of his arrest, October 22, 1960 (99a-104a).*

On November 18, 1960, almost a month after petitioner's arrest and arraignment, agent Hamilton again questioned petitioner concerning the facts of the crime. The agent stated that during this interview he reviewed the facts of the crime and confronted petitioner with state-

* The facts concerning the post-arraignment and post indictment interrogations were brought out upon the cross examination of agent Hamilton.

ments of co-defendant, Ohrynowicz. Petitioner denied the statements of Ohrynowicz (108a, 115a-117a). The FBI agent stated that he did not know at the time of the second interview on November 18, 1960 that petitioner was represented by counsel (122a).

The indictment was filed on November 22, 1960 and on December 7, 1960 petitioner pleaded not guilty (2a). Arnold E. Roseman, Esq., filed a notice of appearance on behalf of petitioner on January 4, 1961 (criminal docket). On January 3, 1961 a motion was filed on behalf of petitioner seeking severance, suppression of evidence and a bill of particulars (2a-3a). On January 9, 1961 this motion was argued before Dawson, D. J. (3a) and granted in part (3a). On January 25, 1961 hearings on the motion to suppress were held (5a). On February 9, 1961 Judge Dawson denied the motion to suppress. On February 27, 1961 the government's bill of particulars and affidavit of mailing were filed (5a, 14a-15a).

In the meantime, sometime during the month of February, 1961, agent Hamilton together with agent Herlihy again confronted petitioner (108a-110a, 112a, 117a, 122a). This time the agents admittedly knew that petitioner was represented by an attorney (122a). At this interview, which took place in front of petitioner's place of business, agent Hamilton inquired concerning petitioner's attorney and his pre-trial motion (109a). Sustained objections prevented cross examination with respect to most of the interview, i.e., whether the facts of the crime were discussed, an argument about appellant's innocence, whether the co-defendants and their attorneys were discussed (109a-110a).

The next interview occurred on April 21, 1961. Agent Hamilton, together with agent Herlihy again confronted

petitioner in front of his place of business and induced him into an FBI automobile, drove away with him and again conducted an interrogation (110a-111a, 113a, 117a-118a, 120a-122a).

It was the agents' purpose to convince petitioner that it would be in his interest to testify confirming the agent's version of the statements allegedly made by petitioner at the time of his arrest (i.e., to take the stand and confess) (113a, 118a, 122a). Petitioner denied the facts to which the agent desired testimony—his alleged guilty knowledge—and refused to do what the agents wanted even though agent Hamilton, in what can only be termed a veiled threat, stated that he would take the stand and testify against petitioner (111a).

On re-direct examination by the prosecution the agent contradicted his former testimony concerning the April interrogation stating that the only conversation consisted of his request of petitioner that he testify and petitioner's refusal (111a). On re-cross examination, petitioner's trial attorney attempted to inquire concerning this contradiction. To facilitate this, petitioner's attorney started to request the stenographer's minutes. The Trial Judge, interrupting counsel's application, stated:

> "I won't permit it counsel. I have a recollection. In fact I have notes as to what he said on cross examination. I can recall what he said and I can compare it with what he now says, that the entire conversation was, in substance, his request—he asked him to testify and he said 'No'." (120a-121a).

This limitation of cross examination and the non-disclosure of the interview reports concerning the post in-

dictment interviews (R. 944-945)* prevented full exposure of the agent's over reaching.**

It is submitted that the agent's overreaching was an unconstitutional interference with and an intrusion upon the relationship between petitioner and his counsel. This case does not fall squarely into the class of silent or mechanical governmental intrusion upon the attorney client relationship. These intrusions have been held to deprive an accused of his rights under the Sixth Amendment.***

Here the intrusion was overt rather than merely silent or mechanical and to that extent, petitioner's invocation of the Sixth Amendment raises a novel point. Here, the post arraignment and post indictment interference took the form of unauthorized, unsolicited legal advice by an attorney-agent for the prosecution. This legal advice was inconsistent with petitioner's defense and could only result in his prejudicial confusion.

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* See Reason two for granting this petition

** Though a new trial is warranted solely upon this limitation of cross examination, it is submitted that the deprivation of petitioner's constitutional right is sufficiently demonstrated on the record as is and a new trial cannot cure the potential effect of the interference with petitioner's right to unhampered representation by counsel

*** See *Coplon* v. *United States*, 191 F. 2d 749 (D. C. Cir. 1951) cert. denied, 342 U. S. 926, where the interference with the attorney-client relationship was by wiretap; *United States* v. *Denno*, 221 F. 2d 926 (2d Cir.), cert. denied, 349 U. S. 968 (1955) where the suspected interference was allegedly by an agent "planted" in a position to eavesdrop without the aid of a mechanical device; *United States* v. *Venuto*, 182 F. 2d 510 (3d Cir. 1950) where an accused was prevented from consulting with his attorney for 18 hours; *Caldwell* v. *United States*, 205 F. 2d 879 (D. C. Cir. 1953) where the intrusion by government agents upon a conference between an accused and his counsel was held violative of the accused's rights under the Fourth, Fifth and Sixth Amendments as well as under the "obstruction of justice" statute 18 U. S. C. Sec. 1503.

During the first five months after indictment, while one attorney, a prosecution agent, was advising petitioner to take the stand, to confess and even to testify as to facts denied by petitioner, his real attorney was advising him otherwise. Petitioner pleaded "not guilty". Pre-trial motions were being made (3a), hearings were being held (5a), and the real defense attorney was further occupied on behalf of his client.*

Between indictment and trial, petitioner was entitled "* * * to the effective assistance of counsel * * * the guiding hand of an able and responsible lawyer, devoted solely to the interest of his client." *Willis* v. *Hunter*, 166 F. 2d 721, 723 (10th Cir.) *Cert. denied*, 334 U. S. 848 (1948). He was entitled to an attorney of his own choosing and not one forced upon him by the prosecution. *Glasser* v. *United States*, 315 U. S. 60 (1942)**.

Further, it is not necessary as suggested by the court below that appellant show the adverse effect of the deprivation of the constitutional right. *Coplon* v. *United States*, *supra*; *Glasser* v. *United States*, *supra*; *United States* v. *Dennis*, *supra*; *United States* v. *Venuto*, *supra*. To take advantage of the constitutional protection here, petitioner did not have to take the stand and testify concerning the

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* Legal representation at the early stage of the prosecution is, of course, most important. In *Spano* v. *New York*, 360 U. S. 315, Justices Douglas, Black and Brennan noted, p. 326:

> "When he is deprived of that right after indictment and before trial he may indeed be denied effective representation by counsel at the only stage when legal aid and advice would help him."

** In *Glasser*, *supra*, the accused was subjected to legal counseling from a lawyer whose conflict of interest arose, not from his association with the prosecution, but from his representation of a co-defendant.

havoc and confusion caused by the government agent's unconstitutional interference with the defense. It is unnecessary to speculate as to the prejudices suffered by appellant.* To adapt the language of this court in the *Murray* case decided the week of this writing:

> "It is no defense to urge that the * * * practices here may be relatively minor encroachments on the [rights of the indicted]. The breach * * * that is today a trickling stream may all too soon become a raging torrent and in the words of Madison, 'It is proper to take alarm at the first experiment on our liberties'."

This court should grant a writ of certiorari to correct the wrong upon petitioner but more important, so that it can define the constitutional right of indicted defendants to be free from unlawful contact by the prosecutor's office. For an attorney to contact his adversary's client is deplored and unethical in a civil case. In a criminal case, standing by itself, such contact is dangerous and strikes at the constitutional guarantees of the indicted. The action of the FBI agents demonstrated an approach to law enforcement which is clearly wrong and permits the gradual erosion of the constitutional right to counsel. Neither the prosecution nor either of the courts below conceded the impropriety of the employed law enforcement procedure. The agents repeated overreaching and the failure by the courts below to at least comment upon the federal agencies basic approach to law enforcement demonstrates a need for judicial direction from this court relating to police action directed toward the indicted.

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* Such speculation could include a refusal by petitoner to take the stand despite his attorney's advice; i.e., if Hamilton wants it, I don't or Hamilton says I am wrong on the facts and he is going to take the stand to contradict me. No matter what you say, Mr. Roseman, (appellant's real attorney) I'm not getting up there.

2. In its review of the Jencks Act materials withheld from defense counsel, the court below, in the following language implicitly directed the question of the propriety of the trial court's action to this court:*

> "Clark, Circuit Judge (concurring in the result):
>
> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. §3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in *United States* v. *Annunziato*, 2 Cir. 293 F. 2d 373, 382, *cert. denied Annunziato* v. *United States*, 368 U. S. 919, that it is only 'harmless error' not to produce a statement which appears to 'corroborate' a witness's testimony, or in *United States* v. *Simmons*, 2 Cir. 281 F. 2d 354, 357 358, and the present case that the defense is not entitled to statements not sufficiently exact, though to the district judge 'probably verbatim,' recitals of the witness's oral statements.

* Petitioner raised the question below in the following language:

> "Appellant requests that this Court examine for discoverability the exhibits marked 'Court Exhibits' none of which were given to defense upon application under 18 U. S. C. A. §3500. Attention is particularly requested concerning the court exhibits encompassing the reports of agent Hamilton and those reports of agents Ball, Herlihy and Duffin which were adopted by agent Hamilton as joint reports. It is noted that agent Hamilton had an interview log to which he referred for information concerning the time of his interview of Margolis on the day of arrest (190a). It would seem that the agent's interview log was discoverable concerning the disputed duration of the post indictment interrogations."

> By employing one or more of these doctrinal devises the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted. I concur in the reversals of the Harris and Kaminsky convictions and in the opinion so far as it relates to these matters."

Thus, one of three federal appellate judges indicated his concern respecting the propriety of the Jencks Act exceptions adopted by the lower court.

It is submitted that this Court should grant a writ of certiorari regarding this area of concern. A trial judge must issue his Jencks Act rulings instantaneously, between direct and cross-examination. His rulings are unaided by the advocacy process. A need is demonstrated for clarification of the application of this statute and, to the extent possible, a set of guides with respect to permissible exceptions. Such guides should, as suggested by Judge Clark, come from this court.

3. It is submitted that this court should grant a writ of certiorari in order to define the proper judicial steps

for the trial court when a prosecution witness limits his cross-examination by the invocation of the privilege against self-incrimination.

Prosecution witnesses Ohrynowicz and Friedman supplied the major portions of the government's case. Both Ohrynowicz and Friedman upon cross-examination, invoked the privilege against self-incrimination thus limiting and thwarting what would have been legitimate avenues of cross-examination. The court below held that where the assertion of the privilege precluded inquiry into matters to which the witness testified on direct examination the witness' direct testimony must be stricken (A10-A13).

The Circuit Court found that Ohrynowicz invoked the privilege against self-incrimination as to collateral matters only and that it was not error for the District Court to refuse to strike his direct testimony (A7-A9).

The court, however, reversed the conviction of Ralph Kaminsky and Lawrence Harris because witness Friedman, on whose testimony their convictions were based, invoked the privilege against self-incrimination as to a matter about which he testified on direct examination (A10-A13).

Although it was conceded by the government that the *sine qua non* of petitioner's conspiracy conviction was the testimony of Friedman (157a-158a), the court below permitted petitioner's conviction to stand. The court did not review petitioner's conspiracy conviction since the sentence for it was concurrent with the sentence on the receiving count. However, petitioner's conviction on both counts was, in part, based upon the testimony of witnesses Friedman and Ohrynowicz—both of whose cross-examinations were curtailed by their invocation of the privilege against self-incrimination.

Research does not disclose that this court has ever permitted limitation of defendant's right to cross-examination based upon a witness' invocation of the privilege against self-incrimination. It is submitted that the court should grant the writ of certiorari in order to define for the courts below the constitutionality of the convictions of defendants whose rights of cross-examination are limited by prosecution witnesses' invocation of the privilege against self-incrimination.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
June 19, 1963.

Respectfully submitted,

JOSEPH P. ALTIER
Attorney for Petitioner

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of April, one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ISIDORE BORGEN, et al.,
Defendants,

JOHN CARDIELLO, LAWRENCE HARRIS, RALPH KAMINSKY, JOHN KNAPP, LOUIS MARGOLIS, LOUIS PISELLI, NICHOLAS STEN,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of conviction of said District Court of Lawrence Harris and Ralph Kaminsky be and they hereby are reversed.

It is further ordered, adjudged and decreed that the judgments of conviction of said District Court as to John Cardillo, John Knapp, Louis Margolis and Louis Piselli, be and they hereby are affirmed.

A. Daniel Fusaro
Clerk

A3

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

LOUIS MARGOLIS,

Petitioner,

vs.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 22, 1963

(S) JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 15th
day of May, 1963

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOORE, *Circuit Judge*:

Appellants were all in some way involved in the interstate transportation and sale of furs stolen from the Zwerdling fur shop in Paterson, New Jersey. The indictment was in four counts: Piselli and Knapp were convicted on Count One of transporting stolen goods in interstate commerce, 18 U. S. C. §2314, and on Count Two of conspiring to transport stolen goods in violation of §2314. All appellants were convicted on Count Three of receiving goods which were moving in interstate commerce knowing the same to have been stolen, 18 U. S. C. §2315, and on Count Four of conspiring to receive goods in violation of §2315. Knapp was sentenced to concurrent ten-year terms on Counts One and Three and concurrent two-year terms on Counts Two and Four; the sentences on Counts Two and Four are to be served consecutively to the sentences on Counts One and Three. Piselli was sentenced to concurrent sentences of ten years on Counts One and Three and two years on Counts Two and Four. Harris and Margolis were sentenced to concurrent four-year sentences on Counts Three and Four. Cardillo received concurrent five-year sentences on Counts Three and Four. Ralph Kaminsky was sentenced to six years on Count Three and five years on Count Four, both sentences to be served concurrently.

The major part of the government's case was supplied by the testimony of Thaddeus Ohrynowicz and Max Fried-

man, both of whom testified to having a part in the criminal plan.

Ohrynowicz testified that Knapp approached him about taking part in a burglary in New Jersey and that, after examining several possibilities, they decided to rob the Zwerdling fur shop in Paterson, New Jersey. After surveying the store area on September 17, 1969, they concluded that they would need the assistance of a lock man. When they returned to New York that night, they communicated with Piselli, a lock expert, and he agreed to work with them. The following day, Sunday, September 18th, Knapp, Ohrynowicz and Piselli drove from New York City to Paterson and, after picking up tools at a garage that they had rented, they proceeded to Zwerdling's. They secured entrance to the fur shop by breaking into a dentist's office above the shop and drilling a hole through the floor into the store below. As Piselli and Ohrynowicz were leaving with the furs, on their way to join Knapp at the car, they were accosted by residents of the building who demanded to know what was in the bags that they were carrying. Piselli and Ohrynowicz fled in different directions and, in his flight, Ohrynowicz dropped the bags of furs that he was carrying. Piselli managed to meet Knapp and put the furs, which he was carrying, in the car. Knapp drove the car back to New York, Piselli and Ohrynowicz each returned to New York separately. That night, after his return from New Jersey, Ohrynowicz met Cardillo in a bar in New York and told him of the Zwerdling robbery. After a short time Knapp joined them and told them that he had left the furs in a locker at the Port Authority Bus Terminal in New York City. Knapp, Ohrynowicz and Cardillo then drove in the latter's car to the terminal and got the furs which Cardillo and Ohrynowicz took to Ohrynowicz's hotel room.

On Tuesday, September 20, 1960, Knapp told Ohrynowiez that Nicholas Sten[1] had found a man named Lou (later identified as Margolis) who was willing to purchase the furs for $7,500. On the following day, Sten called Margolis and arranged for him to meet Ohrynowiez that day. At this meeting Margolis asked for some time to think over the purchase. They met again the following day. Margolis then agreed to take the furs but told Ohrynowiez that he could not pay for them until he sold them. On Saturday, September 24th, Ohrynowiez delivered the furs to Margolis at his place of business. On the following Tuesday Sten delivered $4,000 to Ohrynowiez who divided it, giving two-thirds to Knapp (presumably one-third was for Piselli) and keeping one-third for himself. On Friday, September 30th, Sten delivered $3,500 to Ohrynowiez who, after deducting $300 to cover the payment of $150 each to Sten and Cardillo, made the same division of the remainder.

Friedman testified that on September 20, 1960, Harris told him that he had an opportunity to buy some stolen furs, which he later stated came from the Zwerdling store in Paterson, New Jersey, and asked if Friedman could lend him some money for the purchase. About a week later, Harris told Friedman that Margolis offered him the furs for $7,500 and that he was going to meet Margolis and pick up the furs. When they met later the same day at Harris's house, Harris had the furs and asked Friedman for a loan of $5,000. Friedman then went out to obtain the $5,000. Upon his return, he gave

[1] Sten was convicted along with the appellants in this case and filed a notice of appeal. However he did not file an appeal or a brief or participate in the oral argument. Therefore we have not considered the merits of his appeal and it will remain pending. This action is without prejudice to the government's right to move to dismiss the appeal for failure to prosecute.

it to Harris. Harris then said that he had to go to meet Margolis but he told Friedman to return later that evening. Friedman returned and met Harris at about ten P. M. and at about one A. M. Ralph Kaminsky arrived. Kaminsky agreed to pay $250 each for 28 of the fur pieces and the three men took the furs and put them in Kaminsky's car.

The first question to be considered is whether the assertion of the privilege against self-incrimination by Ohrynowicz and Friedman during cross-examination so limited appellants' right to cross-examine the witnesses against them that the convictions should be reversed. After having been instructed by the judge that he could refuse to answer questions if the answers would tend to incriminate him under state or federal law, Ohrynowicz refused to answer several questions by defense counsel relating to prior criminal activity unrelated to the crime at issue. Friedman was also instructed that he had a right to refuse to answer questions if the answers would incriminate him, and he refused to answer questions concerning the source (other than a "friend") of the $5,000 that he allegedly lent to Harris to finance the purchase of the furs from Margolis.

The right of a defendant in a federal court to confront the witnesses against him, guaranteed by the Sixth Amendment, includes the right to test the truth of those witnesses' testimony by cross-examination. *Greene* v. *McElroy*, 360 U. S. 474, 496-96 (1959); *see In re Murchison*, 349 U. S. 133 (1955); *In re Oliver*, 333 U. S. 257 (1941); *Alford* v. *United States*, 282 U. S. 687 (1931); *Kirby* v. *United States*, 174 U. S. 47 (1898). The importance of cross-examination in our jurisprudence has been well stated by Professor Wigmore:

> "It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this in the mind of a lawyer of experience." (5 Wigmore, Evidence § 1367 (3d ed. 1940))

Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. *E.g., Alford* v. *United States*, *supra*; *United States* v. *Mason*, 2 Cir. 1960, 275 F. 2d 129; *United States* v. *Lester*, 2 Cir. 1957, 248 F. 2d 239. However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States* v. *Kravetz*, 3 Cir. 1960, 281 F. 2d 581; *Homer* v. *United States*, 9 Cir. 1958, 259 F. 2d 274; *United States* v. *Toner*, 3 Cir. 1949, 173 F. 2d 140. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of

prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part. *Montgomery* v. *United States*, 5 Cir. 1953, 203 F. 2d 887; *cf. United States* v. *Andolschek*, 2 Cir. 1944, 142 F. 2d 503; *Stephan* v. *United States*, 6 Cir. 1943, 133 F. 2d 87; *United States* v. *Kaiser*, W. D. Ky. 1937, 19 F. Supp. 639.

The district court was not in error in refusing to strike Ohrynowicz' testimony. After admitting to a substantial criminal record, Ohrynowicz invoked the privilege against self-incrimination when asked whether he committed other crimes in the past and whether he was guilty of certain crimes with which he was then charged in the state courts. These questions were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination. Since the trial court was aware of his substantial criminal record and the pendency of other criminal actions against him, the defendants were not prejudiced by Ohrynowicz' assertion of the privilege and, therefore, there was no need to strike his testimony. *United States* v. *Kravitz*, *supra*; *Hamer* v. *United States*, *supra*; *United States* v. *Toner*, *supra*.[2]

[2] There is some question whether it was proper for the trial judge to hold that Ohrynowicz was entitled under the Fifth Amendment to refuse to answer questions if the answers would incriminate him only under state law. *Compare United States* v. *Murdock*, 284 U. S. 141 (1931), with *Ullman* v. *United States*, 350 U. S. 422 (1956); *Ballman* v. *Fagin*, 206 U. S. 180 (1900); and *United States* v. *Saline Bank*, 1 Pet. (26 U. S.) 100 (1828). We do not have to decide this question, however, because appellants were not prejudiced by Ohrynowicz' assertion of the privilege.

HARRIS and KAMINSKY

Defense counsels' motion to strike the testimony of Max Friedman because of his refusal on Fifth Amendment grounds to answer questions concerning the source of the $5,000 that he allegedly gave Harris to use for the purchase of the stolen furs presents a much more troublesome problem. Friedman's testimony comprised practically the entire case against Harris and Kaminsky. He testified that Harris had told him "that he (Harris) had a chance to buy a lot of clipped [stolen] furs", that the asking price was $9,000 which he thought was too much, that "he was going to wait to see if he can get them cheaper" and asked was he [Friedman] in a position to help him by loaning him some money if he consummated the d . . . Friedman testified further that he had been at Harris house a week later on which occasion Harris told him that he had bought the furs for $7,500 and that he had asked Friedman if he had the money. Friedman said that he left and returned with $5,000 which he gave to Harris. After some cross-examination concerning his financial resources (which tended to show that he was not a man who would be expected to have a sum as large as $5,000 at hand), Friedman said that he had borrowed the money from a friend. When the defense attorneys attempted to cross-examine him further on the source of the $5,000, he invoked the privilege against self-incrimination.

Whether the witness's refusal to answer followed by the trial court's failure to strike the witness's testimony, or at least that portion thereof relating to the subject matter under inquiry, constitutes reversible error requires an analysis of the purpose of the inquiry and the role which the answer, if given, might have played in the defense. The defendants primarily affected are Harris and Kaminsky.

Kaminsky's counsel argued that if he could prove that Friedman had not borrowed the $5,000 from a friend "his [Friedman's] credibility as a witness falls". Counsel for Harris and Kaminsky, respectively, moved to strike Friedman's entire testimony. The trial court denied the motion saying, "I make it a practice not to strike any testimony * * *".[3] Approaching the question from the "credibility" point of view, the trial judge had heard ample testimony damaging to Friedman's credibility. To the court it was "obvious he is a burglar" which comment Friedman immediately confirmed by saying, "Yes, my business is a burglar." A further attack on Friedman's credibility might well be regarded as surplusage or cumulative and the refusal to strike would have been wholly justified.

However, resolution of the question is not quite so simple. The $5,000 was to enable Harris to buy the furs. Friedman in his testimony said that he had put this amount into Harris's hands. This financial transaction was not collateral but directly related to Harris's participation in the conspiracy and to Friedman's being present on the various occasions as to which he testified against Harris and Kaminsky.

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[3] This remark may have been made in reference to the court's practice in non-jury trials in which proper weight can be given to all testimony and the relevant sifted from the irrelevant. In jury trials and, particularly, in multi-defendant cases with conspiracy counts, it is often necessary to receive testimony subject to connection or subject to a motion to strike. If not connected, or if connected only to one or more of many defendants, a motion to strike as to other defendants or instructions to disregard would appear to be in order. The effectiveness of such procedures after the testimony has been heard by the jury has been the subject of speculation, metaphysical and otherwise, by jurists and trial lawyers for generations. However, in multi-defendant trials our jury system compels reliance upon the jury's ability to follow and act upon the judge's instructions as to the applicable law and with respect to individual defendants the applicable evidence.

Had Friedman disclosed the name of the lender, there would have been several possibilities. The lender might not have been available as a witness, he might have confirmed the loan, he might have denied making it or the defense might have been able to introduce other proof to show that the alleged lender could not possibly have made the loan. If the proof were sufficiently convincing to induce a belief that the loan had never been made, the court's reaction to all of Friedman's testimony might have been so adverse that it would have accepted no part thereof. Disclosure of a direct lie relating to the events testified to might have had far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admissions of prior crimes.

This is not to say that every refusal to answer by a witness, claiming his constitutional right against self-incrimination, requires the striking of his testimony or a part thereof. There would appear to be at least three categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which event a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circum-

stances. Unsatisfactory as such a generality is for a trial judge who is required to give instantaneous rulings on close questions and who does not enjoy the luxury of reflective appellate deliberation, any set of specific dogmas would be even more unworkable.

In this case, despite the original claim that his proposed cross-examination related to "credibility," it was not the type of testimony that would have developed the general unsavory character of the witness as might questions dealing with prior convictions. The answers solicited might have established untruthfulness with respect to specific events of the crime charged. It is in this field that the decisions appear to call for the striking of testimony.[4] The ground given is not so much that credibility is involved but that refusal to answer thwarts a fundamental right of the defendant to cross-examine his accusers. The refusal of Friedman to answer falls into this category and for this reason the judgments of conviction against Harris and Kaminsky must be reversed. Since a new trial of these two defendants may be forthcoming, we think it wise to discuss their other contentions.

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[4] In a situation such as this we might do well to recall the admonition of Mr. Justice Stone in *Alford v. United States*, *supra*, at 692:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test without which the jury cannot fairly appraise them * * *. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

Somewhat analogous is *Montgomery v. United States*, 5 Cir. 1958, 261 F. 2d 887, in which the court reversed a tax-evasion conviction because

Both Harris and Kaminsky assert that the government failed to prove that the furs were "moving as * * * a part of, or * * * constitute[d] interstate commerce" when they received them. They claim that by the time the goods reached them they were no longer in interstate commerce and, therefore, they were not guilty of a federal crime. In attempting to show that the purchases were purely intrastate transactions, they emphasize the fact that the furs had been in New York for several days before they received them and that they got the furs from Margolis who had originally received them from the thieves.

When the original conspiracy to steal and transport goods in interstate commerce contemplates the eventual sale of the goods to an innocent purchaser, the goods continue in interstate commerce until they reach that destination and anyone who purchases the goods from one in the conspiracy knowing that they were stolen and transported in interstate commerce becomes part of the conspiracy. *Roberson* v. *United States*, 5 Cir. 1956, 237 F. 2d 536; *Wilkerson* v. *United States*, 7 Cir. 1930, 41 F. 2d 654; *cf. Pilgrim* v. *United States*, 5 Cir. 1959, 266 F. 2d 486;

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the defendant, who was charged with not reporting as income money that he received as bribes, was precluded because of the witness' right not to answer questions that would incriminate him from cross-examining a government witness, who testified that he gave a bribe to the defendant, about bribes that he might have paid to others. The court said:

> "Cross-examination of a witness is a matter of right. *Alford* v. *United States of America*, 282 U. S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624. See *J. E. Hanger, Inc.* v. *United States*, 81 U. S. App. D. C. 408, 160 F. 2d 8; *Jianole* v. *United States*, 8 Cir., 200 F. 496. Indeed, cross-examination, as has been often observed, is the surest test yet devised of the truthfulness of a witness' testimony, and its allowance is especially important in the case of a witness who is himself an admitted violator of the law."

Schwachter v. *United States*, 6 Cir. 1956, 237 F. 2d 640. In such a case it is for the trier of fact to determine whether the interstate character of the transaction has been established. In this case the evidence was sufficient to support the inference that the original plan encompassed the eventual sale to an innocent purchaser and that Harris and Kaminsky had the requisite knowledge of the theft and interstate transportation.

KNAPP

There is no merit to Knapp's claim that there was not sufficient evidence to support his conviction. The evidence shows that he participated in the burglary, drove the stolen goods to New York, was active in the effort to obtain a purchaser for the furs, and shared in the proceeds of the sale. He claims that the part of Ohrynowicz' testimony relating to what he told Ohrynowicz was hearsay, but these statements were admissible against him as admissions and acts in furtherance of the conspiracy. 4 Wigmore, Evidence §§ 1048, 1079 (3d ed. 1940).

PISELLI

Piselli claims that his conviction must be reversed because the government failed to prove that he knew, when he participated in the robbery, that the furs were to be transported in interstate commerce, or that he had any part in the conspiracy to receive the stolen goods. While there is no direct evidence to show that Piselli knew of the interstate character of the theft, there is sufficient circumstantial evidence to support the conclusion that he had such knowledge. See *Schwachter* v. *United States*, 6 Cir. 1956, 237 F. 2d 641. He was in New York when he was first approached about taking part in the robbery; he knew that the robbery was to take place in New Jersey; he drove

from New York to New Jersey with the other participants in the crime the morning of the robbery; he started back with Knapp but left the car to look for Ohrynowicz and not finding him returned directly to New York after the robbery. Since there was sufficient evidence to sustain Piselli's conviction on the illegal transportation counts, we need not consider whether there was sufficient evidence to sustain his conviction on the receiving counts because all the sentences are concurrent. *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Mont*, 2 Cir. 1962, 306 F. 2d 412.

CARDILLO

The evidence against Cardillo is sufficient to support his conviction. He accompanied Knapp and Ohrynowicz to the Port Authority Terminal to pick up the furs; he attempted to find a buyer for the furs; and he shared in the proceeds of their sale.

Cardillo requested that we examine certain statements by government witnesses that were not turned over to the defense pursuant to their request under 18 U. S. C. 3500, but which were presented to the court for in-camera inspection. We have examined these statements and find that the defense was not entitled to their production.

To avoid any confusion as to the materials from the prosecutor's files which were given or shown to defendants' counsel during the trial, on January 21, 1963, by an order to supplement the record, we requested the trial judge to indicate which of the papers in the envelope sealed during the trial (a) were admitted in evidence at the trial; (b) were delivered to defense counsel for examination before or during the trial; and (c) by order of the court were not shown to the defense during the trial. Judge Murphy promptly reported on January 30, 1963,

His report lists (A) transcript of grand jury testimony and F.B.I. reports and statements (17 exhibits in all) given to defense counsel during the trial; (B) F.B.I. reports, statements and certain handwritten material which were marked for identification but not given to counsel for any of the defendants on the ground that they did not come within the purview of section 3500 of Title 18, U. S. C., were seen only by the Court and ordered to be sealed, some of which singly or collectively were marked as Court's exhibits.

To determine whether there was reversible error in the trial judge's rulings with respect to the material in category B, this court has examined all the papers.

It is, of course, settled that if the defense is entitled to production of a statement, "it is not for us to speculate whether they could have been utilized effectively." *Clancy v. United States*, 365 U. S. 312, 316 (1961). The question before us, however, is whether the statement in question "related to" the direct testimony of the witness. The statement must relate generally to the events and activities testified to. *Jencks v. United States*, 353 U. S. 657 (1957); *Ogden v. United States*, 303 F. 2d 724 (9th Cir. 1962). Thus, if the statement deals only with the witness's general background and personal history and does not deal with the events and activities testified to on direct examination, it is not producible under the Act. *Ogden v. United States, supra*. In *United States v. Simmons*, 281 F. 2d 334 (2d Cir. 1960), a prosecution for bank robbery, we approved the action of a trial judge in withholding from defense counsel a statement of a bank officer reciting that he had not packaged any twenty dollar bills immediately prior to the robbery and that as a rule he did not handle or package money in the course of his duties, as the statement did not relate to the subject mat

ter of the witness's testimony on direct examination as he had testified only to the events on the day of the robbery. Statements that did relate to Ohrynowicz's testimony at trial, those describing the preparation for and perpetration of the crime and the efforts to dispose of the furs, were turned over to the defense. The defense was given two lengthy reports of statements by Ohrynowicz to the F.B.I. and Ohrynowicz's Grand Jury testimony.

The statements which were not turned over related primarily to a loan made by Ohrynowicz to Sten, who is not before us on this appeal and to Ohrynowicz's activities during the summer of 1960, namely, in June, July and August, prior to the September 18th robbery. The statements do not deal with testimony adduced from Government witnesses on direct examination which affects the appellants herein.[5] They concern themselves largely with Ohrynowicz's source of income during the summer which he claimed was shoplifting.

In view of the large amount of material turned over by the prosecution to defense counsel, including Ohrynowicz's statements dealing with his planning of, and participating in, the crime in question, there was no error in the exercise of the trial court's judgment in not turning over collateral matter which did not relate to the events and activities testified to by the witness. The trial judge was in a position to grasp the significance of the testimony of the government witnesses and was in the best position to determine which reports and statements related to their testimony and which were incidental or collateral. His decision is not to be overturned unless clearly erroneous.

[5] Although Cardillo was only one of the appellants who requested that we examine these statements we have determined that none of the appellants were entitled to receive these statements.

Palermo v. United States, 360 U. S. 343 (1957); *Hance v. United States*, 299 F. 2d 389 (8th Cir., 1962).

As to the reports or statements of Agent Bergholtz, his testimony occupies four-and-one-half pages of the record. He stated that he and other agents arrested Sten on October 20, 1960; and that a search of Sten's residence at that time uncovered a card with Ohrynowicz's address written on it. His testimony related to no other defendant. It is inconceivable that any other defendant could have had the slightest interest in impeaching Bergholtz with respect to the details of his arrest of Sten.

In our opinion, the decision of the trial court that the documents in question were not within the purview of section 3500 was not clearly erroneous. This conclusion is supported by our own independent examination of the same documents.

MARGOLIS

Margolis' conviction is supported by testimony other than that of Friedman. His claim that his conviction of conspiracy cannot stand because the government failed to prove that he had knowledge of the interstate shipment of the furs is not well founded because such knowledge is not necessary to sustain a conviction on the ground of receiving stolen goods which are moving in interstate commerce. 18 U. S. C. § 2314. Since Margolis' sentence on the conspiracy count is concurrent with the sentence on the receiving count, the judgment below can be sustained, even if the conspiracy conviction was improper. *Lawn v. United States*, *supra*; *United States v. Mont*, *supra*. There is no merit in Margolis' claim that the fact that government agents spoke to him on two different occasions after he was indicted and on one occasion between the

time of arrest and indictment in the absence of his counsel requires reversal of his conviction. The government did not introduce any statements made during these interviews and the agents' actions did not interfere with Margolis' right to counsel.

The judgments of conviction of Harris and Kaminsky are reversed; the judgments of conviction of all other appellants are affirmed.

CLARK, *Circuit Judge* (concurring in the result):

We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in *United States* v. *Annunziato*, 2 Cir., 293 F. 2d 373, 382, cert. denied *Annunziato* v. *United States*, 368 U. S. 919, that it is only "harmless error" not to produce a statement which appears to "corroborate" a witness's testimony, or in *United States* v. *Simmons*, 2 Cir., 281 F. 2d 354, 357-358, and the present case that the defense is not entitled to statements relating to purely incidental or collateral aspects of a witness's testimony, or in *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not sufficiently exact, though to the district judge "probably verbatim," recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this

very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted. I concur in the reversals of the Harris and Kaminsky convictions and in the opinion so far as it relates to these matters.